

consider necessary to perform or complete the work; and (H) prosecute and defend any action or proceeding incident to constructing the Network.

(iii) Company shall reimburse State on demand all sums State pays pursuant to this subsection (d) and all costs and expenses it incurs in connection with the performance of any act authorized by this subsection (d), including but not limited to any contractor and/or Company or S&W fee to be paid to any party State retains to perform the work, the reasonably allocated wages, salaries, compensation and overhead of State staff and employees performing any construction work, and interest on all the foregoing sums at the average rate the State pays under new issues of State general obligations. S&W shall have the same obligation to State, but only with respect to such costs and expenses which arise out of or result from an S&W Default.

(e) State shall have and hereby reserves and is granted a perpetual right of entry by State and its agents, contractors, subcontractors, vendors, employees and representatives onto the premises of the Network operations center and onto any location where the Network or any portion thereof is located or being constructed, and any staging areas, exercisable without notice at any time or times after a Company Default or S&W Default and failure to cure within the applicable cure period, if any, for the purpose of carrying out operation of the Network and so long as such Default is outstanding. Neither State nor any agent, contractor, subcontractor, vendor, employee or representative of State shall be liable to Company or S&W in any manner for any inconvenience or disturbance arising out of its exercise of such right of entry in order to perform under subsection (d) above, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such party. If State exercises any right to pay or perform under subsection (d) above, it nevertheless shall have no liability to Company or S&W for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of design, construction, administration or operation, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such party.

(f) Each right and remedy of State hereunder shall be cumulative and shall be in addition to every other right or remedy provided herein, and the exercise or beginning of the exercise by State of any one or more of any of such rights or remedies shall not preclude the simultaneous or later exercise by State of any or all other such rights or remedies. The rights and remedies of State against S&W set forth in this Agreement and the S&W Guaranty shall be the sole and exclusive rights and remedies of State against S&W.

#### **Section 16.4 State Default.**

(a) Each of the following events shall constitute a State Default:

(i) a failure by State to make payments to Company as and when required under this Agreement;

(ii) State shall fail to observe or perform any covenant, agreement, term or condition required to be observed or performed by State under this Agreement, including but not

limited to State's covenants to provide Company with entry onto and access to Right of Way and State's covenant under Section 11.1; or

(iii) any representation or warranty made by State herein shall be inaccurate or misleading in any material respect on the date made.

(b) Company and S&W acknowledge that no act or omission of any federal, State, regional or local government, or agency thereof, other than MnDOT and DOA, shall constitute State Default hereunder.

**Section 16.5 Cure Periods.** State shall have the following cure periods with respect to the following State Defaults:

(a) respecting a State Default under Section 16.4(a)(i), a period of 30 Days after State receives written notice of the State Default, except to the extent of amounts being contested in good faith, in which case cure must be effected within 30 Days after a final determination of the amount owed; and

(b) respecting a State Default under Section 16.4(a)(ii) or (iii), a period of 60 Days after State receives written notice of the State Default; provided that if the State Default is of such a nature that the cure cannot with diligence be completed within such time period and State has commenced meaningful steps to cure promptly after receiving the default notice, State shall have such additional period of time, up to a maximum cure period of 120 Days, as is reasonably necessary to diligently effect cure.

**Section 16.6 Company or S&W Remedies.**

(a) Except as otherwise provided in subsections (b), (c) and (d) below, upon the occurrence of a State Default and expiration, without full cure, of any cure period available respecting such State Default, Company or S&W may exercise any one or more of the following remedies as Company or S&W in its sole discretion shall determine:

(i) without waiving any of Company's or S&W's rights to legal relief, in the event of a material State Default, Company may terminate this Agreement and the Permits, in whole, by written notice to State, in which case Company and S&W shall have no further obligations hereunder except to take the action required to be taken by Company or S&W under Sections 15.4, 15.5, 17.7 and 17.8, and thereafter Company and S&W shall be released from any and all liabilities arising from acts relating to the Network occurring after the date of such termination and transfer, except for liabilities covered by Company's and S&W's indemnities in Sections 13.2 and 13.6;

(ii) without waiving any of S&W's rights to legal relief, in the event of a material State Default, S&W may suspend work and/or terminate its particular obligations under this Agreement and the S&W Guaranty, in whole, by written notice to State. If S&W elects to suspend work or terminate its particular obligations due to such State Default, S&W shall not

incur any liability under this Agreement by reason thereof, and any delay caused thereby shall be treated as an event of Force Majeure;

(iii) without waiving any of its rights to legal relief, in the event of a material State Default Company may elect to and, in the event of a non-material State Default, Company and S&W shall, continue in force and effect its rights under this Agreement and the Permits to construct, operate, administer, maintain, repair, replace and renew the Network as provided herein; and

(iv) exercise any other rights and remedies available to Company or S&W under this Agreement or available to Company or S&W at law.

(b) State's obligation to pay any monetary damages or other compensation or award under subsection (a) or (b) above is conditioned upon and limited by the following:

(i) except as otherwise provided in subsection (d) below, payment to Company or S&W is conditioned upon express legislative authorization and appropriation of such damages, compensation or award; and

(ii) Company shall be entitled to recover (A) upon termination of this Agreement due to a material State Default, the fair market value of the Network as a going concern, plus all reasonable costs Company incurs in connection with termination of User Agreements with affected Collocating Customers which State elects not to assume pursuant to Section 15.5, based on an audit of Company's records, and (B) if Company elects not to terminate this Agreement, then the lost profits from the Network proven with reasonable certainty to proximately result from the State Default. In either case, State shall have no liability for any other consequential, incidental, special or indirect damages, and no liability for exemplary damages or other damages not recoverable at law, but this limitation does not limit the potential scope of liability of any MnDOT highway construction or maintenance contractor to Company or S&W for any such damages proximately caused by its actionable negligence.

(c) If Company shall have terminated this Agreement due to a material State Default and State shall continue to collect revenues from the administration or operation of the Network, State, to the extent authorized by Laws and Regulations, shall apply such revenues toward any outstanding monetary damages or other compensation or award owing to Company under subsection (a) or (b) above from such revenues.

(d) Promptly after any final judgment is rendered by a court of competent jurisdiction or arbitrator awarding compensation or damages to Company or S&W, State shall institute payment procedures as set forth in Minn. Stat. Ch. 548 and 572; provided, however, Company or S&W shall not receive payment to the extent that any amounts are recovered from revenues as provided in subsection (c) above.

### **Section 16.7 Dispute Resolution.**

(a) All Claims between Company or S&W and State shall be resolved solely as provided in this Section 16.7.

(b) As a condition precedent to the right to bring a Claim to the appropriate Claim resolution body as set forth in subsection (c) below the Claimant shall first serve a written Notice of Claim on the other party's designated agent.

On State's behalf, and until further written notice, such agent shall be the State Project Manager.

On Company's behalf, and until further written notice, such agent shall be:

Mr. Al Strock  
ICS/UCN, LLC  
910 15th Street, Suite 500  
Denver, Colorado 80202

On S&W's behalf, and until further written notice, such agent shall be:

Mr. Bruce R. Bulger  
S&W Communications Services Group  
7677 East Berry Avenue  
Englewood, Colorado 55402

(i) The Notice of Claim shall provide the other party with the following information: (A) the date of the act, inaction or omission giving rise to the Claim; (B) an explanation of the Claim, including a description of its nature, circumstances and cause; (C) a reference to any pertinent provision(s) from this Agreement, Permits or the S&W Guaranty; (D) the estimated dollar amount of the Claim; (E) the resolution desired; and (F) any other information the Claimant deems relevant.

(ii) In the case of a Design and Construction Claim, the parties shall attempt in good faith to negotiate a resolution of the Claim within three business Days after the Claimant serves its Notice of Claim. If necessary or appropriate to assist in such negotiations, the parties shall involve their respective executive officers and officials, to the extent available.

(iii) In the case of other Claims, if the parties do not succeed in resolving the Claim within 30 Days after the Claimant serves its Notice of Claim, then the Claimant shall have 30 Days thereafter in which to appeal to the appropriate claim resolution body described in subsection (c) below.

(c) Conditional upon the satisfaction of the requirements set forth in subsection (b) above, the applicable claim resolution procedure identified in this subsection (c) shall apply.

(i) Unless the parties agree in writing to an alternate claim resolution procedure, unresolved Design and Construction Claims shall be resolved through expedited arbitration in accordance with subsection (d) below. Except as provided in subsections (c)(ii) below and unless the parties agree in writing to an alternate claim resolution procedure, other unresolved Claims shall be resolved: (A) through binding arbitration in accordance with subsection (e) below, where arbitration is specified elsewhere in this Agreement or where the cumulative amount in controversy of all unresolved Claims is less than \$200,000; or (B) through litigation in the District Court of Ramsey County, Minnesota, which shall have exclusive jurisdiction and venue, where the cumulative amount in controversy of all unresolved Claims is equal to or greater than \$200,000.

(ii) Notwithstanding the provisions of subsection (c)(i) above:

(A) Where a Claim, other than a Design and Construction Claim, seeks declaratory relief and arbitration is not specified elsewhere in this Agreement, the party seeking declaratory relief shall have the right to bring that sole matter to litigation in the court set forth in subsection (c)(i) above, unless the parties agree in writing to another claim resolution procedure; and

(B) Except where arbitration is specified elsewhere in this Agreement, State shall have the right to bring directly to litigation, in the court set forth in subsection (c)(i) above, independent of any other Claim, a Claim, other than a Design and Construction Claim, in which State seeks non-monetary relief, including but not limited to specific performance or injunctive relief. Except as otherwise provided in this Agreement, Company or S&W shall have no right to seek non-monetary relief in court.

(d) All unresolved Design and Construction Claims shall be resolved by expedited arbitration in accordance with the following provisions.

(i) The arbitration shall be held before a single arbitrator from a list of eligible arbitrators. State, Company and S&W shall prepare a mutually acceptable list of eligible arbitrators within 60 Days after the Agreement Date. All eligible arbitrators shall be former judges for the federal or state courts serving the State of Minnesota. If the parties are unable to agree upon the list of eligible arbitrators, any party may petition the District Court of Ramsey County, Minnesota to order or confirm a list. The single arbitrator shall be selected in the order set forth on the approved list, based on availability, unless the parties agree otherwise. If no arbitrator is available, then the parties shall agree on some other single arbitrator within two Days of learning of the unavailability of all listed arbitrators. If the parties are unable to agree, then any party may petition the District Court of Ramsey County, Minnesota to appoint an arbitrator, who shall be a former judge as specified above or an attorney experienced in the subject matter of the dispute and in serving as an arbitrator.

(ii) The arbitration shall take place within seven Days after the Claimant serves notice of its Design and Construction Claim. The arbitration shall take place in Hennepin

or Ramsey County, Minnesota at the office of the arbitrator or in another location in the State mutually convenient to the parties and the arbitrator, provided that the arbitrator may elect to convene the arbitration at a location in the State convenient for viewing evidence at construction sites relevant to the dispute.

(iii) The arbitration proceeding shall last not more than two consecutive Days and shall conclude within such two-consecutive Day period. The parties may submit any documents or materials to the arbitrator before the arbitration proceeding takes place and any submitted documents or materials shall also be delivered by hand to the other parties not later than two Days before the arbitration proceeding takes place. The parties may not conduct any discovery before the arbitration proceeding. The parties may call witnesses, who shall testify under oath, and submit relevant documents or materials during the arbitration proceeding. The parties shall have the right to conduct cross-examination of any witnesses of another party and to challenge any documents or materials. The parties shall have the right to make motions to the arbitrator before and during the arbitration proceeding. The parties agree not to seek any injunctive relief from any court before or during any such arbitration proceeding. The parties are not required to produce a record (stenographic or cassette tape) of the arbitration proceeding, but any party may do so at its own cost and expense.

(iv) The arbitrator shall render a decision within 48 hours after conclusion of the arbitration proceeding. In rendering a decision, the arbitrator shall apply all relevant facts and circumstances and the provisions of this Agreement, including but not limited to all provisions regarding applicable design and construction standards, standards for review and approval of matters, conditions, covenants and limitations, and all applicable law, including but not limited to rules of contract interpretation. The arbitrator is authorized and empowered to render a decision only for the purpose of resolving the Design and Construction Claim presented. Except for resolution of issues regarding prices to be charged to State pursuant to applicable provisions of this Agreement (e.g. price determinations under Section 3.3(e) or 5.10), the arbitrator shall have no power or authority to make any monetary or damage award of any kind, or to award any party its costs and expenses with respect to the arbitration.

(v) The decision of the arbitrator shall be final and binding upon the parties, except that any party may appeal the arbitrator's decision to the District Court of Ramsey County only in the event of any of the following:

- (A) the arbitrator exceeded his or her authority or refused to hear evidence timely presented and material to the issue in dispute;
- (B) the decision of the arbitrator was procured by corruption, fraud or undue means;
- (C) evident bias by the arbitrator; or
- (D) corruption of the arbitrator or arbitrator misconduct prejudicing the rights of any party.

(vi) Each party to the arbitration shall share equally the arbitrator's fees and expenses (subject to appropriation in the case of the State), and each party shall bear its own costs and expenses, legal and otherwise, with respect to the arbitration.

(e) The following provisions govern Claims, other than Design and Construction Claims, brought to arbitration pursuant to subsections (c)(i) above.

(i) Either party electing to bring its unresolved Claims to arbitration pursuant to subsection (c)(i) above shall serve upon the other party a written request for mandatory and binding arbitration. The two parties shall then seek to mutually agree upon the arbitration process, and any other matter pertinent to arbitration not otherwise addressed in this subsection (e). If the parties cannot agree upon such issues within 30 Days, then the party seeking arbitration shall be entitled to compel arbitration by serving a demand for arbitration, in accordance with American Arbitration S&W ("AAA") rules, on the other party and the AAA. To the extent not modified in this subsection (e) or in Section 13.5(b)(iii), the arbitration shall be administered through the AAA using the appropriate arbitration rules.

(ii) Selection of the arbitrator and the administration of the arbitration shall proceed in accordance with AAA rules using arbitrators from the list developed by the AAA, except that where the cumulative amount in controversy of all Claims presented is less than \$25,000 (exclusive of interest), the appropriate AAA Arbitration Rules shall be used, and arbitrator selection shall proceed pursuant to Section 55 of the Expedited Procedures of the Construction Industry Arbitration Rules or any successor provision on such subject. In all cases the arbitrator selected shall be experienced in the subject matter of the dispute.

(iii) The scope and extent of discovery shall be as determined by the arbitrator in accordance with AAA rules; except that, for Claims where the cumulative amount in controversy of all Claims presented is greater than \$25,000 (exclusive of interest), each party shall serve upon the other and the arbitrator, no less than 30 Days prior to the arbitration hearing, a statement of proof, which shall include:

(A) the identity, current business address, and residential address of each witness who will testify at the hearing;

(B) whether an expert witness is to be called, and if so: the identity of that witness; a statement of the subject matter of the expert testimony; the substance of the opinions to which the expert is expected to testify; a summary of the grounds for each opinion; and a resume of the expert's qualifications; and

(C) a list of every document that the party intends to offer in evidence at the arbitration hearing. Either party then may serve upon the other a request for any document listed, which copy shall be provided within 10 Days from the date that the request is received. The arbitrator may permit a party to call a witness or offer a document not included in the statement of proof only upon a showing of good cause.

(iv) The parties shall diligently cooperate with one another and the arbitrator to resolve the claims, and shall perform such acts as may be necessary to obtain a prompt and expeditious resolution of the Claims.

(v) The decision of the arbitrator shall be based upon the relevant facts, circumstances and equities of the case, as well as the pertinent provision(s) of this Agreement and any Permits, and shall be set forth in writing.

(vi) The venue of any arbitration hearing shall be in St. Paul or Minneapolis, Minnesota.

(vii) The decision of the arbitrator shall be binding, and judgment upon the award rendered by the arbitrator may be entered in the District Court of Ramsey County.

(viii) Each party shall bear its own fees and costs, and both shall share the joint costs of the arbitration.

(ix) If any party acts to unreasonably delay or prevent arbitration, the other party shall be entitled to enforce the arbitration provisions of this Agreement by petition to the District Court of Ramsey County.

(f) The following provisions apply to all Claim resolution processes.

(i) Any document required to be served in this Section shall be deemed served when delivered in compliance with Section 20.3.

(ii) The arbitrators selected according to the procedures set forth in this Section shall have the authority and jurisdiction to determine whether it is the proper body, under subsection (c) above, to resolve the Claims brought to it. If the arbitrator selected determines that it is not the proper body to resolve the matters, it shall refer the parties to the proper claim resolution procedure and body. In the case of such a reference, all statutes of limitations, periods of repose, and time limits for Claims under this Agreement shall be deemed tolled from the date the Claim is submitted to the arbitrator until the date when said Claim is referred to and received by the proper claim resolution body.

(iii) Each party shall bear its own attorneys' fees and costs in any Claim resolution procedure pertaining to this Agreement, and no party shall seek or accept an award of attorneys' fees or costs.

#### **Section 16.8 Limitations on S&W Liability.**

(a) Notwithstanding any other provision of this Agreement to the contrary, State hereby waives any and all Claims against S&W for indirect, special or consequential damages, whether such damages arise in contract, tort or otherwise, and irrespective of fault, negligence or strict liability. The foregoing waiver shall not, however, in any manner:

(i) limit S&W's liability for any type of damages arising out of third party Claims for bodily injury (including death) or property damage or arising under any indemnification respecting third party Claims given by S&W under Section 13.2, 13.6 or elsewhere in this Agreement;

(ii) prejudice State's right to recover liquidated damages from S&W pursuant to Section 16.3(a); or

(iii) limit the liability of Company to the extent provided hereunder.

(b) Notwithstanding any other provision of this Agreement to the contrary, with the exception of S&W's indemnification obligations for third party Claims for bodily injury (including death) and third party Claims for property damage, S&W's total aggregate liability under this Agreement and the S&W Guaranty, whether arising in contract, tort (including negligence or strict liability), warranty or otherwise, is limited to and shall not exceed the total of the amount of insurance required under this Agreement plus \$12.5 million. S&W's liability shall not be reduced or diminished by reason of any failure to carry or failure or inability to collect insurance (except inability to collect due to exhaustion of the policy limits required under this Agreement), nor is liability conditioned upon collection.

(c) Notwithstanding any other provision of this Agreement to the contrary, with the exception of (i) third party Claims for bodily injury (including death) or third party Claims for property damage, (ii) the time limit applicable to Claims made under the S&W Guaranty pursuant to Section 5.8(e) and (iii) the time limit applicable to S&W's indemnification obligations under Section 13.2(e), S&W's liability arising out of or in connection with this Agreement shall be limited to Claims for which S&W receives written notice from the State within two years after the last Acceptance Date for Phase 1 of the Network.

(e) S&W's liability to State for defective work shall be exclusively controlled by the S&W Guaranty, provided S&W complies with its obligations thereunder.

(f) S&W is not obligated or liable for Phase 2 unless it performs work for Phase 2.

(g) S&W shall have no liability to State for any Company Default.

(h) For purposes of this Section 16.8, "third party" has the same meaning as set forth in Section 13.2(f).

**Section 16.9 No Personal Liability.** This Agreement does not create any express or implied personal or individual liability for any employee, agent, representative, member, director, officer or official of any of the parties.

**ARTICLE XVII**  
**RECORDS, AUDITS, REPORTS AND INTELLECTUAL PROPERTY**

**Section 17.1 Maintenance and Inspection of Records.**

(a) Company and S&W shall maintain at their addresses specified in Section 20.3 or such other locations within the State as Company and S&W determine to be appropriate all Intellectual Property, books of account, other financial accountings and reports, contracts, agreements, correspondence, memoranda, work papers and all other work product relating to the Network.

(b) Company and S&W shall maintain all such documents and records according to logical and comprehensive project development file system plan which includes an indexing process to enable the documents and records to be easily located at all times. Company shall retain each item of such documents and records for a period of at least seven years before disposal, and shall retain all contracts and agreements, including but not limited to Key Contracts and User Agreements for a period of at least five years after expiration or termination thereof. The file system plan shall include retention schedules consistent with the foregoing and a disposition process for all documents and records.

**Section 17.2 Inspection and Audit**

(a) Within three business Days after receipt of written request therefor, Company and S&W shall make all books and records subject to Section 17.1, other than privileged attorney-client communications, available for State inspection, audit or reaudit, at State's expense. State shall make such request not more often than annually, except in the case of any good faith suspicion of fraud in connection with this Agreement or the Network.

(b) State's right to inspect, audit and reaudit books and records subject to Section 17.1 shall continue after the Agreement Term ends, so long as State delivers to Company or S&W a written request to inspect, audit, and/or reaudit within 24 months after the Agreement Term ends.

(c) Notwithstanding subsection (a) above, any audit or reaudit arising out of any good faith suspicion of fraud in connection with this Agreement or the Network may be conducted unannounced and without any prior notice.

(d) State may require, not more often than annually, implementation of reasonable additions or changes to Company's or S&W's accounting procedures with respect to this Agreement or the Network if the same are necessary or appropriate to effect more complete or accurate record keeping, accounting or disclosure and such additions or changes are consistent with generally accepted accounting principles.

### **Section 17.3 Public Data.**

(a) Any documents and records which are prepared by S&W, Company, their agents, contractors or consultants and delivered to State may be (but not necessarily will be) considered public data under the Minnesota Public Data Practices Act, Minn. Stat. Ch. 13 (1996), and as such may be subject to public disclosure. State recognizes that certain documents and records may contain proprietary trade secret information or confidential information exempt from disclosure under Minn. Stat. §13.37. Should the contents of any documents and records which Company or S&W has previously identified and marked as confidential or trade secret information become the subject of a request for public disclosure submitted to State, it shall notify Company or S&W, as the case may be (either being the "concerned party"), in writing of such request and the date by which it anticipates responding, which date shall in no event be less than five Days after the date of such notice. If within such five-Day period the concerned party informs the State in writing that all or any portion of the designated document or record contain proprietary information that is exempt from disclosure under Minn. Stat. §13.37 or is subject to protection pursuant to some other provision in Minn. Stat. Ch. 13 or other state law, the State either shall withhold such designated portion of the document or record from disclosure if it believes a valid claim of exemption exists or inform the concerned party by written notice that it believes public disclosure is required by law, that it intends to make the disclosure requested and the date the disclosure will be made, which in any case shall be not less than three Days after the date the State delivers such written notice to the concerned party. If a denial of a request for disclosure of documents or records or excision of information is challenged under Minn. Stat. §§13.03, 13.072 or 13.08, the concerned party shall assist the State in the defense. If the State delivers to the concerned party written notice of its intent to disclose information which the concerned party contends is exempt from disclosure, the concerned party may take such court action as it deems appropriate prior to disclosure.

(b) In the event Company or S&W believes that any documents or records subject to transmittal to or review by State under the terms of this Agreement contains proprietary, trade secret or other materials that are exempt or protected from disclosure pursuant to applicable State Laws and Regulations, Company or S&W, as the case may be, shall identify and clearly mark such information prior to such transmittal or review.

### **Section 17.4 Reporting Requirements.**

(a) Within 120 Days after the end of each Fiscal Year throughout the Term (and, in addition, within 120 Days after the Term ends for any reason with respect to items (iv) and (v) below), Company shall submit to State financial reports setting forth the following information, as applicable, for such Fiscal Year:

- (i) the amount of Total Revenues;
- (ii) the amount of Project Debt as of the end of such Fiscal Year and the holder(s) of Project Debt;

(iii) the amount of total expenditures on renewal and replacement and technology upgrades; the Network;

(iv) the size of, changes in and uses of the Maintenance Fund;

(v) the size of, changes in and uses of the Technology Upgrade Fund;

(vi) a list of the names and addresses of all users under User Agreements during such Fiscal Year;

(vii) a description of all equity, joint venture and other forms of shared participation in the business of Company respecting the Network entered into or under consideration to implement Section 19.1(c); and

(viii) any additional matters covered in any periodic financial report delivered to any Lender, provider of credit enhancement, nationally recognized municipal securities information repository, rating agency or underwriter.

(b) Not later than one month after the beginning and midpoint of each Fiscal Year in which Company or S&W is engaged in any designing, permitting, constructing, procuring, installing or equipping of the Network or any portion thereof, Company and S&W shall prepare and deliver to State a written narrative report on the progress of design, permitting, construction, procurement, installment and equipping of the Network since the immediately preceding report, or, if there was no preceding report, from the inception of Company's work on the project, describing in reasonable detail all significant activities concerning design, Regulatory Approvals, new contracts and subcontracts with contractors, subcontractors, vendors and suppliers identifying the parties, scope and amount, construction and construction progress and discovery and correction of defects. Such report shall include a discussion of the Schedule of Performance and Company's and S&W's compliance therewith, of any new or continuing delays and the causes thereof and a summary of all new changes to the architectural design and topology, Equipment configurations and/or Plans and Specifications for the Network. Such report shall include a description of any significant dispute, claim, action, assertion, lien or notice concerning design or construction, the amount in dispute or claimed, copies of any lien notice, stop notice, complaint, demand or other pertinent documents which State requests, availability of insurance and insurance defense, and actions taken and contemplated to defend against, settle or remove the dispute, claim, action, assertion, lien or notice. Such report also shall describe any damage or destruction and restoration work and revenue information (such as but not limited to insurance awards) relating to any such occurrence. Such report shall be delivered at the same time as the reports under subsection (c) below. The requirement for such reports with respect to a Construction Segment shall cease after the Acceptance Date for such Construction Segment, except with respect to disputes, claims and liens which continue after such Acceptance Date. The requirement for such report shall be annual after the last Acceptance Date for Phase 1. S&W shall be relieved of its reporting obligations under this subsection (b) after the last Acceptance Date for Phase 1, except with respect to (i) the final report due after such Acceptance Date,

- (ii) disputes, claims or liens which involve S&W and continue after such Acceptance Date and
- (iii) any work S&W may perform on Phase 2.

(c) Not later than 90 Days after the end of each Fiscal Year or partial Fiscal Year throughout the Term, Company shall prepare and deliver to State, a written narrative report on all significant activities and events, adverse and advantageous, affecting the financing, operation, administration, maintenance, repair, renewal, replacement or management of the Network. Such report shall include data on demand and utilization respecting the Network, data on service response times, interruptions and failures, including frequency, locations and causes, any significant damage, destruction and repair work, any disputes with Company or claims, actions or assertions against Company or the Network by any governmental authority, any general contractor, any architect or engineer, any subcontractors, vendors or suppliers, any party to a User Agreement or any other person relating to financing, operation, administration, maintenance, repair, renewal, replacement or management, and any other information that State may reasonably request from time to time.

(d) In addition to the reports specified in subsections (b) and (c) above, Company shall deliver to State (i) the monthly reports regarding O,A&M described in Section 7.3(b)(x) and (ii) concurrently with its delivery to any Lender, true and complete copies of each report concerning construction or operation of the Network which Company is required to provide any Lender.

(e) In addition to the matters specified in subsections (a), (b), (c) and (d) above, each of Company and S&W shall within 30 Days of the end of each calendar quarter (120 Days in the case of the calendar quarter in which the Fiscal Year ends) provide State with a written certification executed by the chief executive officer or chief financial representative of Company or S&W, as applicable, to the effect that, except as otherwise specifically disclosed in the certification, (i) the representations and warranties of the certifying party contained in this Agreement are true and correct in all material respects as if made on the certification date; (ii) the certifying party has performed all its covenants contained in this Agreement to be performed by the certifying party on or before the certification date; (iii) all computations performed by the certifying party and submitted to State pursuant to the terms of this Agreement have been computed in accordance with the provisions of this Agreement; and (iv) as of the certification date the certifying party is in compliance with all provisions of this Agreement, including all Exhibits hereto (other than those Exhibits which are unexecuted forms of agreements).

(f) The statements, certifications and reports described above shall be prepared by Company or S&W, as applicable, in a format reasonably acceptable to the State Project Manager and, to the extent applicable, according to generally accepted accounting principles consistently applied.

(g) Company and S&W shall furnish or cause to be furnished to State, prior to their becoming available, copies of all press releases and other statements made available generally to the public or media concerning the Network or this Agreement. At any time that any litigation or

administrative proceeding is pending or threatened which could adversely affect the Network or this Agreement, all press releases and other statements concerning the Network, this Agreement or such litigation or administrative proceeding shall be subject to State's review and approval prior to release or publication; provided that Company or S&W may issue press releases or other statements without such approval if advised by legal counsel that such issuance is required by Law or Regulation.

(h) MnDOT and DOA shall furnish or cause to be furnished to Company and S&W, prior to their becoming available, copies of all press releases and other statements by MnDOT or DOA officials, other than elected officials and officials appointed by the Governor or State Legislature, made available generally to the public or media concerning the Network or this Agreement. At any time that any litigation or administrative proceeding is pending or threatened which could adversely affect the Network or this Agreement, all press releases and other statements concerning the Network, this Agreement or such litigation or administrative proceeding which MnDOT or DOA desire to issue shall be subject to Company's and S&W's review and approval prior to release or publication; provided that (i) MnDOT or DOA may issue press releases or other statements without such approval if advised by legal counsel that such issuance is required by Law or Regulation, (ii) the foregoing in no manner applies to or affects press releases or other statements by any instrumentality of State government other than MnDOT and DOA and (iii) the foregoing in no manner applies to or affects press releases or other statements by elected officials or by officials appointed by the Governor or State Legislature.

**Section 17.5 Powers and Duties of State Officials.** Nothing contained in this Agreement shall in any way limit the duties and rights of state officials set forth in Minn. Stat. §16B.06, subd. 4 (1996), including without limitation the duties and rights of the Office of the Legislative Auditor, State Auditor, MnDOT Auditor and DOA Auditor in carrying out their legal authority.

#### **Section 17.6 Software Licensing.**

(a) Company shall, or shall cause its software suppliers to, license State to use any software necessary for access to and use of the Network and Equipment. Such license shall be provided at no fee or cost to State.

(b) Each supplier of software (including Company if it is acting as a supplier of software) to or for use in operating the Network or Equipment shall warrant the following for the benefit of State:

(i) that such software is free from programming errors and from defects in workmanship and materials;

(ii) that such software shall operate in conformity with the performance capabilities, specifications, functions and other descriptions and standards applicable thereto and shall conform to the standards generally observed in the industry for similar software;

(iii) that such software shall be compatible with the Network and Equipment;

(iv) use of the software with the Network and Equipment in accordance with specifications will not infringe any patent, copyright, trade secret, or other intellectual property or proprietary rights of others; and

(v) the software is year 2000 compatible. As used herein, "year 2000 compatible" means: (A) the software will not cease to perform before, during, or after the calendar year 2000, (B) the software will not produce abnormal, invalid, and/or incorrect results before, during, or after the calendar year 2000, (C) the software will include but not be limited to data century recognition, calculations that accommodate same century and multi-century formats, and date data that reflect century, and (D) the software will accurately process date data (including but not limited to calculating, comparing and sequencing) from, into, and between the twentieth and twenty-first centuries, including leap year calculations.

(c) Subject to this Section 17.6, at all times prior to the end of the Agreement Term Company:

(i) may license Network and Equipment software which Company owns or controls to third parties for use by such third parties in designing, constructing and operating telecommunications systems and facilities, and

(ii) may license Network and Equipment software which Company owns or controls to third parties as necessary for use by such third parties to access the Network, and for use by such third parties to access other telecommunications systems and facilities that have been designed to use the Network and Equipment software.

(d) All licenses and user contracts for Network and Equipment software shall provide that all rights of Company under such agreement shall be automatically transferred to and vested in State when the Agreement Term ends for any reason and thereafter all amounts payable to Company under such licenses and user contracts shall be payable to State.

**Section 17.7 Rights of State on Termination.** When the Term ends for any reason, all ownership and licenses of Company in, of, or with respect to all Network and Equipment software shall automatically vest in State without payment of any license or other fee or charge by State to Company or any other party, free and clear of all liens and encumbrances; and neither Company nor any other party (except software suppliers, as to their respective interests) shall have any further interest therein or right thereto. When the Term ends for any reason, State shall automatically have a perpetual, fully paid up, transferable license to use and enjoy all patents and copyrights of Company in, of, or with respect to the Network and Equipment, including but not limited to Network and Equipment software. When the Term ends for any reason, Company shall immediately deliver to, or as directed by, State all Intellectual Property, including copies thereof in all media.

**Section 17.8 Intellectual Property Escrow.** State and Company acknowledge that certain technical data, including the software source code and the software source code documentation, constitute information concerning the design of the Network, Equipment or a component which, if subject to public disclosure, would deprive Company and/or Company's software suppliers of commercial value, but access to which State must be ensured, to the extent commercially feasible, when the Term ends or when Company or a software supplier is the subject of a voluntary or involuntary petition in bankruptcy, ceases to conduct business or dissolves. Accordingly, Company shall cause all Escrowed Material to be provided to a trustee under a trust agreement among State, Company, the software supplier and the trustee, the basic terms of which shall be as follows:

(a) the trustee shall be a bank or trust company qualified to engage in a trust business in the State of Minnesota, which bank or trust company shall be mutually acceptable to State and Company.

(b) the Escrowed Material shall be placed with such trustee for safekeeping in a Minnesota county mutually agreeable to State and Company;

(c) upon each major software release, revision or upgrade after the Agreement Date, Company shall deposit, or to the extent commercially feasible cause the software supplier to deposit, with such trustee the Escrowed Material, and within seven Days after any such deposit with such trustee, both Company and the trustee shall give written notice of receipt to State;

(d) the cost of preparation of the Escrowed Material shall be borne by the software supplier or Company, and State shall have no liability for such cost;

(e) upon reasonable written notice to Company and such trustee, State may conduct reasonable tests of the Escrowed Material, under Company's and/or the software supplier's supervision, to reasonably confirm the condition of the Escrowed Material. State shall bear any direct costs of such testing;

(f) except as provided with respect to transfer to State of the Network and Equipment software and related materials and rights when the Term ends, title to the designs, copyrights, patents and trade secrets divulged in the software shall remain with Company or the software supplier, as the case may be, subject to the rights and licenses granted to State by and in accordance with Sections 17.6 and 17.7;

(g) during the Agreement Term, in the event a software supplier enters into voluntary or involuntary receivership arrangement or other bankruptcy or insolvency proceedings, ceases to engage in business or is dissolved, the trustee, upon receipt of written notice from Company, and unless prohibited by Law or Regulation, shall turn over to Company a complete copy of the portion of the Escrowed Materials as to which the release triggering event has occurred at the end of the third Day following receipt of such notice. Company shall give such written notice promptly after it obtains knowledge that any such release triggering event has occurred. From and after the date such Escrowed Material is released to Company, Company shall have the

obligation to update and maintain the related software so long as such software is used in connection with the Network or Equipment, or if such software is replaced, to cause the supplier of the replacement software to escrow the source code and source code documentation in accordance with this Section (unless it is not commercially feasible for Company to obtain it); and

(h) in the event that (i) the Term ends for any reason or (ii) Company enters into voluntary or involuntary receivership arrangement or other bankruptcy or insolvency proceedings, ceases to engage in business or is dissolved, such trustee, upon receipt of written notice from State, and unless prohibited by Law or Regulation, shall turn over to State all of the Escrowed Materials which Company then owns or controls at the end of the third Day following receipt of such notice. The escrow shall continue as to those Escrowed Materials which were submitted by software suppliers other than Company and which have not previously been released to Company pursuant to subsection (g) above; and such Escrowed Materials shall continue to be subject to the terms of subsection (g) above except that the State shall have automatically succeeded to the rights of Company. Prior to the occurrence of one of the release triggering events identified in this subsection (h), State shall have no access to the Escrowed Materials.

## ARTICLE XVIII LENDER RIGHTS AND REMEDIES

**Section 18.1 Security Instruments.** At any time, and from time to time during the term of this Agreement, Company and S&W shall have the right, at their sole cost and expense, and subject to any restrictions on the use of funds set forth in Article XII, to pledge, hypothecate, assign or collaterally assign to any Lender as security for Project Debt all or any part of the rights and interests of Company and S&W set forth in subsection (c) below, subject to the following conditions (any pledge, hypothecation, assignment or other security instrument which satisfies all such conditions set forth in this Section 18.1 being referred to in this Agreement as a "Security Instrument").

(a) Except as otherwise provided in this Agreement, and only to secure Project Debt, Security Instruments may be made for any amounts and upon any terms (including, but not limited to, terms of the loans, interest rates, payment terms and prepayment privileges or restrictions) as desired by Company.

(b) Any construction loan or permanent loan Company obtains shall be made by one or more banks, savings and loan associations, thrift and loan associations, pension funds, credit unions, insurance companies, trust companies, venture capital funds or any other entity or person or any combination of the foregoing. Any such loan also may be procured through issuance of bonds.

(c) A permitted Security Instrument may, except as hereinafter provided, cover all of Company's and S&W's right, title, interest and estate in, to or under:

- (i) this Agreement;
- (ii) the Permits and other Regulatory Approvals;
- (iii) the Network (including the Equipment) ;
- (iv) Total Revenues, the Maintenance Fund and the Technology Upgrade Fund;
- (v) Key Contracts, User Agreements and other contracts, agreements, guarantees and warranties relating to the Network;
- (vi) accounts receivable and proceeds payable to Company with respect to the Network or any contract or agreement relating to the Network; and
- (vii) Intellectual Property, subject, however, to the provisions on Escrowed Material set forth in Section 17.8 and State's rights and interests set forth in Sections 17.6, 17.7 and 17.8.

(d) Lenders shall have all the benefits provided to them in this Article or elsewhere in this Agreement; and the provisions set forth in this Agreement for the benefit of Lenders may be enforced by them.

(e) Notwithstanding any contrary provision of this Agreement, State may, but shall have no obligation whatsoever to, subject or subordinate to the lien of any Lender State's right, title, interest or estate in or to Right of Way or the Network. State shall not be required to join in any Security Instrument. State shall have no liability whatsoever for payment of the obligations secured by any Security Instrument, including principal and any interest accrued thereon or any other sum secured thereby or accruing thereunder. Company shall provide in each Security Instrument that the Lender (i) shall not name or join State or any officer thereof in any legal proceeding seeking collection of the same or the exercise of remedies under or other enforcement of the Security Instrument, and (ii) shall seek no damages against State or any officer thereof except to the extent that Company may be entitled to seek such damages against State.

(f) No Security Instrument or related documents shall grant to the Lender any right to apply funds in the Maintenance Fund or the Technology Upgrade Fund to the repayment of Project Debt or to any other obligation owed to the Lender (except as and to the extent of deposits therein in excess of minimum requirements or as and to the extent expressly provided otherwise in Section 12.2(d)(i)); and any provision purporting to grant such right shall be null and void. However, any Lender or Substituted Entity shall, following the exercise of remedies or transfer in lieu of the exercise of remedies, automatically succeed to all rights, claims and interests of Company in and to the Maintenance Fund and Technology Upgrade Fund.

(g) Company shall provide in each Security Instrument that all rights acquired by a Lender under any Security Instrument shall be subject to each and all of the provisions of this Agreement and all Permits, and to all rights of State thereunder, none of which provisions or rights is or shall be waived by State by reason of the giving of such Security Instrument; but nothing herein shall limit or restrict the rights of Lenders as set forth in this Article.

(h) Each Lender shall agree and acknowledge in its Security Instrument that neither Company nor S&W has any real property interest in Right of Way or the Network, and that Company's and S&W's interest in the Right of Way is limited solely to rights of entry for the purposes specified in, and subject to the terms and conditions of, this Agreement and the Permits.

(i) No Security Instrument shall be binding upon State in the enforcement of State's rights and remedies as provided in this Agreement, and by law, unless and until State has received a copy (certified as true and correct by the Lender) of the original thereof bearing all recording and filing information and a copy of a specimen bond, note or other obligation (certified as true and correct by Lender) secured by such Security Instrument, together with written notice of the address of the Lender to which notices may be sent. In the event of an assignment of any such Security Instrument, such assignment shall not be binding upon State unless and until State has received a certified copy thereof, which copy shall, if required to be

recorded or filed, bear the recording or filing information, together with written notice of the assignee thereof to which notices may be sent.

(j) Each Security Instrument shall require the Lender to deliver to State a copy of any written notice which the Lender delivers to Company declaring a default by Company under the terms of the Project Debt or other obligation or under the terms of any Security Instrument.

(k) Any number of permitted Security Instruments may be outstanding at any one time.

(l) Notwithstanding any exercise of remedies under any Security Instrument, Company and/or S&W shall remain liable to State for the payment of all sums owed to State hereunder and the performance of all of the provisions of this Agreement which are to be carried out and performed by Company and/or S&W.

**Section 18.2 Rights and Obligations of Lenders.** As long as any Security Instrument created in accordance with this Article shall remain unsatisfied of record and State has received the notices specified in Section 18.1(i) the following provisions shall apply with respect to any such Security Instrument and the related Lender.

(a) If both State has been notified of any Lender's name and address in writing, no Company Default or S&W Default shall be grounds for the termination by State of this Agreement or Permits unless and until:

(i) the notice of the Company Default or S&W Default, if any, required to be given under Section 16.2 has been concurrently mailed to Company or S&W, as the case may be, and to each such Lender at their respective addresses registered with State; and

(ii) the applicable cure periods set forth in subsections (b) and (c) below have expired without a cure having been completed, or subsection (d) below is applicable.

(b) In the event State shall have issued a default notice under Section 16.2 and shall have delivered a copy of the same to each Lender, each Lender shall, within the applicable cure period set forth below and otherwise as provided in subsection (c) below, have the right (but not the obligation) to remedy such Company Default or S&W Default or cause the same to be remedied by its Substituted Entity; and State shall accept such performance by or at the instigation of such Lender or Substituted Entity as if the same had been done by Company or S&W. As to each Company Default or S&W Default for which a cure period is available under Section 16.2, each Lender shall have the same amount of time to cure, after State's delivery of the default notice, as is provided to Company or S&W in Section 16.2, plus 30 Days. However, for Company Defaults or S&W Defaults not requiring the payment of money to State but which are curable by a Lender or Substituted Entity, such period to cure shall be extended if the default is capable of being corrected without having right of entry onto Right of Way but cannot reasonably be corrected within such cure period and the Lender or the Substituted Entity begins

meaningful steps to correct such matter within 60 Days and thereafter prosecutes the cure to completion with good faith, diligence and continuity.

(c) State hereby authorizes each Lender to enter onto Right of Way, in a safe and prudent manner and in compliance with all conditions, requirements, limitations and restrictions thereon set forth in this Agreement, the Permits and the O,A&M Plan, for the purpose of taking any actions as may be necessary to cure Company Defaults or S&W Defaults and exercising any of Company's or S&W's rights and powers under this Agreement or the Permits; provided that except for entries strictly for the purpose of non-intrusive, visual inspection, Lenders collectively may exercise such right of entry only by and through one designated, qualified contractor who shall have first been approved in writing by MnDOT and first obtained an entry Permit from MnDOT. Each Lender shall have the right to postpone and extend the time to cure any Company Default or S&W Default capable of being cured only through right of entry onto Right of Way, if such Lender shall:

(i) give State written notice of the exercise of the rights provided to Lender under this subsection (c) prior to expiration of the cure period, if any, available to Company or S&W under Section 16.2;

(ii) within the cure period available therefor under subsection (b) above, cure all Company Defaults and S&W Defaults which may be cured by the payment of a sum of money (unless such amounts are being contested in good faith, in which case cure must be effected within 30 Days after a final determination of the amount owed) and undertake to cure any other Company Default and S&W Default then existing or thereafter occurring and capable of being cured without right of entry in compliance with subsection (b) above, excepting any Company Default or S&W Default under Section 16.1(e) or (f);

(iii) continue to pay when due all fees, rent and other amounts due from Company or S&W under this Agreement or any Permit;

(iv) promptly after receiving notice of the Company Default or S&W Default, initiate and pursue with good faith, diligence and continuity steps to acquire Company's and S&W's interests in this Agreement and the Network by exercise of remedies under its Security Instrument or otherwise; and

(v) execute all documents reasonably requested by State affecting the transactions contemplated by this Section and this Agreement.

(d) If the Lender shall have obtained right of entry diligently and with continuity, shall have delivered to State within 10 Days after obtaining right of entry, an assumption in writing of all duties, obligations and liabilities of Company and S&W under this Agreement arising after such Lender obtains right of entry, and shall have thereafter diligently and with continuity cured all Company Defaults and S&W Defaults which are capable of being cured through right of entry, then the default under this Agreement shall be removed, this Agreement and the Permits shall not be terminated, and the Lender or the Substituted Entity shall succeed to

the interests of Company and S&W under this Agreement. In connection with any Company Default or S&W Default or any condition imposed upon Company or S&W to exercise any rights contained in this Agreement which cannot be cured or performed until the Lender obtains right of entry, the Lender shall have such time after it obtains right of entry as may be necessary with exercise of good faith, diligence and continuity to cure such Company Default or S&W Default or perform such condition.

(e) State may in its sole discretion agree to the Lender's assumption of some but not all of the duties, obligations and liabilities of Company and/or S&W under this Agreement and the Permits.

(f) So long as any obligation secured by a Security Instrument remains unsatisfied, the Lender is proceeding in compliance with subsections (b), (c) and (d) above, and the Company Default or S&W Default is other than one specified in Section 16.1(f) or (g), State shall not be entitled to terminate this Agreement by reason of the Company Default or S&W Default. In the case of a Company Default or S&W Default under Section 16.1(f) or (g), State may terminate this Agreement and the Permits without providing a cure period to any Lender, but shall promptly deliver to each Lender the notice of termination and information set forth in subsection (h) below; and thereafter each Lender shall have the option to obtain a new development agreement and new Permits to the extent provided in subsection (h) below. Nothing in subsections (b), (c) and (d) above shall preclude or delay State from exercising its remedies under Sections 16.3(b)(vi) and 16.3(c).

(g) In addition to all other rights herein granted, each Lender shall have the right to be subrogated to any and all rights of Company or S&W under this Agreement with respect to curing any Company Default or S&W Default. Each of Company and S&W hereby constitutes and appoints each and every Lender as its authorized agent and attorney-in-fact with full power, in Company's and S&W's name, place and stead, and at Company's and S&W's sole cost and expense, to enter upon Right of Way and to perform all acts required to be performed herein and in any Permit, but only in the event that Company or S&W is in default hereunder or under a Security Instrument.

(h) In the event of the commencement of a bankruptcy proceeding by or against Company or S&W, State agrees and acknowledges for the exclusive benefit of each Lender and any person or entity acquiring this Agreement upon or in lieu of the exercise of remedies under any Security Instrument, that the actual or deemed rejection of this Agreement under Section 365 of the Bankruptcy Code (11 United States Code § 365) or any other law having similar effect, shall not in itself effect a termination of this Agreement or affect or impair the lien of such Security Instrument thereon or rights with respect thereto; provided however, that this provision is not intended and shall not be deemed to confer any rights or benefits upon Company, S&W or its bankruptcy trustee. In the event of the termination of this Agreement prior to its expiration due to a Company Default or S&W Default or operation of law, State shall notify each Lender of such termination pursuant to the notice provisions of this Agreement, and shall deliver to such Lender a statement of any and all sums which would at that time be due under this Agreement

and Permits then known to State. Subject to the provisions of this Article (specifically including subsection (m) below), each Lender, to the extent then permitted by law, shall thereupon have the option to obtain a new development agreement and new Permits in accordance with and upon the following terms and conditions:

(i) if State receives a written request from any Lender within 60 Days after its receipt of notice of termination of this Agreement, State shall enter into a new development agreement and new Permits respecting the Network with such Lender or its Substituted Entity;

(ii) such new development agreement and new Permits shall be effective as of the date of termination of this Agreement and shall be for the remainder of the Term of this Agreement, upon the terms, covenants, and conditions contained in this Agreement and the Permits; and

(iii) upon the execution and as conditions to the effectiveness of such new development agreement and new Permits, the Lender shall perform any or all of the following, as the same may be required in State's sole discretion: (A) pay or provide for the payment of any and all sums which would, at the time of the execution thereof, be due under this Agreement or the Permits but for such termination (except sums being contested in good faith, which shall be paid within 30 Days after a final determination of the amount owed), (B) otherwise fully remedy or provide for the remedying of any existing Company Defaults or S&W Defaults under this Agreement that are capable of being cured by the Lender (provided, however, that with respect to any Company Default or S&W Default which cannot be cured by such Lender until it obtains right of entry, such Lender shall have such time, after it obtains right of entry, as is necessary with the exercise of good faith, diligence and continuity to cure such default, and (C) pay or provide for the payment of all expenses (including but not limited to reasonable attorneys' fees, court costs, and disbursements) incurred by State in connection with such default and termination, all State activities during the period from the date of termination to the date the Lender executes such new agreements respecting the Network, including but not limited to permitting, design, construction, procurement, installation, operation, administration, maintenance and management activities, and the preparation, execution, and delivery of such new development agreement and new Permits.

(i) Any payment to be made or action to be taken by a Lender hereunder as a prerequisite to keeping this Agreement in effect shall be deemed properly to have been made or taken by the Lender if such payment is made or action is taken by a nominee of and wholly owned by such Lender, or by such Lender's Substituted Entity.

(j) The parties hereto shall give each Lender notice of any condemnation proceedings against or adverse to any Right of Way in which any portion of the Network is located or in which any portion of Phase 1 of the Network is not yet, but may be, located. Each Lender shall have the right to intervene and be made a party to any such condemnation proceedings, and State, Company and S&W do hereby consent that each Lender may be made such a party or an intervenor.

(k) The creating or granting of a Security Instrument shall not be deemed to constitute an assignment or transfer of this Agreement or the right of entry under any Permit, nor shall any Lender, as such, be deemed to be an assignee or transferee of this Agreement or the right of entry under any Permit so as to require such Lender, as such, to assume the performance of any of the terms, covenants or conditions on the part of Company or S&W to be performed hereunder or thereunder. No Lender, nor any other acquirer of the right of entry whose interest shall have been acquired by, through, or under any Security Instrument or whose interest shall have been derived immediately from any holder thereof, shall become personally liable under the provisions of this Agreement or any Permit unless and until such time as the Lender or such acquirer holds the right of entry to the exclusion of Company. Upon any permitted assignment of this Agreement and the Permits by a Lender or any other acquirer of the right of entry whose interest shall have been acquired by, through, or under any Security Instrument or whose interest shall have been derived immediately from any holder thereof, the assignor shall be relieved of any further liability which may accrue hereunder or thereunder from and after the date of such assignment, provided that the assignee is a Substituted Entity and executes and delivers to State a recordable instrument of assumption wherein such assignee shall assume the rights and obligations of Company and S&W and agree to perform and observe all provisions of this Agreement and the Permits applicable to Company or S&W.

(l) Notwithstanding anything contained herein to the contrary, the provisions of this Section (i) shall not affect, impair or delay State's exercise of its rights under Section 16.3(c) and (ii) shall inure only to the benefit of the holders of Security Instruments.

(m) Multiple Lenders may agree among themselves on the order and extent of their respective rights under this Section. If a certified copy of any such agreement is provided to both State, State shall use its best efforts to accord the opportunities to act under this Section to each such Lender in the order set forth in and to the extent provided in that agreement. In the absence of receipt of such an agreement, or if State, acting reasonably, cannot accommodate the terms of the agreement, if the holders of more than one such Security Instrument shall make written requests upon State in accordance with this Section 18.2 to assume Company's and S&W's obligations under this Agreement, or shall exercise the option for a new development agreement and new Permits under subsection (h) above or the right of first refusal under Section 18.3, State shall accept the request of or grant the new development agreement or new Permits to, as applicable, the holder whose Security Instrument was the earliest to be perfected (unless otherwise agreed in writing by such holder); and thereupon the written requests and notices of exercise of option of each holder whose Security Instrument was perfected later shall be deemed to be void. In the event of any dispute or disagreement as to the respective priorities of any such Security Instruments, State shall have the right to commence court proceedings in the State to determine the issue and to join or interplead the competing Lenders in such action; and the competing Lenders shall jointly and severally be obligated to pay all costs and expenses, including but not limited to reasonable attorneys' fees, which State incurs in connection with such court proceeding.

(n) A person or entity shall qualify as a Substituted Entity only if and when it demonstrates to State's reasonable satisfaction that it and its contractors collectively have the financial resources and experience to timely perform the obligations of Company under this Agreement and the Permits.

### **Section 18.3 Right of First Refusal and to Future Net Revenues.**

(a) If for any reason no Lender is in a position or elects to exercise its rights under Section 18.2, State may, but is not obligated to, after termination of this Agreement as permitted hereunder, grant a new development agreement and new Permits to any third party selected by State, directly undertake operation and administration of the Network or close down or abandon the Network. However, State shall not grant such a development agreement or Permit to a third party unless so required by then applicable law or unless it has first offered the same to each Lender on the same or substantially similar terms and such offer has not been accepted by any Lender within 60 Days.

(b) Exercise of the right of first refusal by more than one Lender shall be governed by Section 18.2(m).

(c) If a Lender shall not have accepted the aforementioned offer, such Lender nevertheless shall be entitled to receive from the new operator of the Network, except another Lender which has become the operator through exercise of its right of first refusal, or State as provided below, as the case may be, payments out of any net revenues generated from the operation of the Network after the payment of such operator's operating costs, capital costs and State-approved rate of return thereon until all amounts outstanding under the Lender's indenture or loan agreements with Company or S&W with respect to the Network, other than default rates of interest, late charges and prepayment premiums and penalties, are paid in full or are otherwise discharged or forgiven, or the new operator's rights have expired or been terminated; provided, however:

(i) if State (directly or through agents) commences to operate or administer the Network, it shall have the unilateral right in its sole discretion to set and change rates and charges (subject to any limitations under applicable Laws and Regulations), classifications of users and conditions of use and to cease operations at any time; and

(ii) if there is more than one unsatisfied Lender, such net revenues shall be paid first to the senior Lender (as determined under Section 18.2(m)) until fully satisfied, then to the next senior Lender, and accordingly in seriatim, unless otherwise agreed in writing by such Lenders as provided in Section 18.2(m).

### **Section 18.4 Cooperation.**

(a) State, Company and S&W shall cooperate by including in this Agreement, by suitable amendment from time to time, any provision which may reasonably be requested by any proposed underwriter, rating agency, Lender, guarantor or insurer of Project Debt, or other credit